

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MOHAMED T.M. ALSHAIR</b>	:	ORDER
		DTA NO. 818974
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the		
Tax Law for the Period December 1, 1997 through	:	
February 29, 2000.		

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Petitioner, Mohamed T.M. Alshair, 3501 28th Street, 2<sup>nd</sup> Floor, Long Island City, New York 11106-3506, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1997 through February 29, 2000.

On May 3, 2002, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On May 20, 2002, the Division of Tax Appeals received a letter from petitioner, appearing *pro se*, in opposition to the dismissal. On May 31, 2002, the Division of Tax Appeals received documents submitted on behalf of the Division of Taxation by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel) in support of dismissal. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, issues the following order.

***ISSUE***

Whether petitioner filed a timely petition following the issuance of a conciliation order.

***FINDINGS OF FACT***

1. Petitioner, Mohamed T.M. Alshair, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") seeking review of a notice of sales and use taxes due pursuant to Articles 28 and 29 of the Tax Law.

2. Following a conference, BCMS issued a Conciliation Order, dated January 11, 2002, denying petitioner's request and sustaining the statutory notice (Assessment ID number: L-019403251).

3. On April 15, 2002, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by regular United States mail and was postmarked April 12, 2002.

4. On May 3, 2002, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner with a copy to the Division of Taxation ("Division"). The notice states:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to § 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on January 11, 2002 but the petition was not filed until April 12, 2002 or ninety-one days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments regarding the proposed dismissal.

5. In response to the Notice of Intent to Dismiss, the Division submitted affidavits from two Division employees, Carl DeCesare and Daniel LaFar. The affidavit of Carl DeCesare, Assistant Supervisor of Tax Conferences, sets forth the Division's general procedure for

preparing conciliation orders. The affidavit of Daniel LaFar, the Principal Mail and Supply Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center for delivering outgoing certified mail to branches of the U.S. Postal Service. Findings of fact “6” through “13” are taken from their affidavits.

6. All conciliation orders mailed within the United States are sent by certified mail. The Division's Data Management Services Unit prepares the final copy of each conciliation order and an accompanying cover letter. The computer-generated conciliation order and cover letter are predated with the anticipated date of mailing. From electronically pulled data, the Advanced Function Printing Unit (AFP) assigns a certified control number to each order and produces a cover sheet that contains the following information: the Division's return address, the anticipated date of mailing, the taxpayer's name and mailing address, a control number assigned by BCMS (the “CMS” number), a certified mail control number and a certified number bar code. The AFP Unit produces a computer-generated document entitled “Assessments Receivable, Certified Record for Non-Presort Mail” (“CMR”). The CMR is a listing of taxpayers to whom conciliation orders are to be sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading “CERTIFIED NO.” At the bottom of the CMR there are spaces to record the “Total Pieces and Amounts Listed ” and the “Total Pieces Received at Post Office.”

7. The Data Management Services Unit forwards the conciliation orders and cover letters to BCMS where they are reviewed and signed by the appropriate conciliation conferee. The conferee then forwards the signed Conciliation Order and cover letter to a clerk assigned to process conciliation orders. The AFP Unit also forwards the CMR and cover sheets to the BCMS clerk assigned to process conciliation orders.

8. The BCMS clerk associates each cover sheet provided by the AFP unit with the appropriate conciliation order and cover letter. The clerk verifies that the information on the cover sheet, the respective conciliation order and the cover letter are the same. All three are then folded and placed in a three-windowed envelope which allows the Division's return address, the certified mail control number, the bar code and the name and address of the taxpayer to show. The clerk also places a stamp stating the date of mailing at the top of the center of page one of the CMR and writes, in the upper left corner of the page, the date the conciliation orders were mailed which in this case is January 11, 2002.

9. The CMR, along with the envelopes, are picked up in the BCMS office by an employee of the Division's Mail Processing Center. A staff member weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR. Once the envelopes are stamped, a member of the mail processing center staff delivers them to a branch of the United States Postal Service ("USPS") in Albany. The postal employee affixes a postmark or his or her initials or both to the certified mail record as evidence of receipt by the USPS. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Mail Processing Center staff member.

10. Mr. DeCesare states that the copy of the two-page CMR attached to his affidavit is a true and accurate copy of the original. Portions of the CMR have been redacted to protect the confidentiality of the taxpayers listed on the CMR. It contains a list of the conciliation orders allegedly issued by the Division on January 11, 2002. There are 21 certified control numbers on

this document. They do not run consecutively. Petitioner's name and address appear on page 1 with the certified mail number, 7104 1002 9739 0066 6869, appearing next to his name.

11. Each of the two pages of the CMR is date stamped January 11, 2002 by the Colonie Center branch of the USPS in Colonie, New York. At the bottom of page two, the number 21 has been entered as the "Total Pieces and Amounts Listed."

12. The following stamp appears at the bottom of each of the pages of the CMR:

POST OFFICE  
Hand write total # of pieces and initial.  
**Do Not** stamp over written areas.

13. The stamp is placed on the CMR by the BCMS clerk. The clerk also writes on the CMR the total number of pieces listed by the sender. In this case, the clerk wrote "11 pieces this page by sender" on the first page of the CMR and "10 pieces this page by sender" on the second page of the CMR. On the first page, the number 11 is written and circled in a location between the handwritten note by the BCMS clerk and the stamp described directly above. The initials P.A. appear next to the circled number eleven. The number 10 and the initials P.A. appear in a similar location on the second page. The fact that a Postal Service employee wrote the number of pieces listed on the CMR to indicate the number of pieces received was established through the affidavit of Mr. LaFar based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

14. Attached to Mr. DeCesare's affidavit is a copy of the Conciliation Order, CMS No. 188022, dated January 11, 2002, which denied petitioner's request and sustained the statutory notice.

15. In response to the Notice of Intent to Dismiss Petition, petitioner submitted a letter stating that he completed and mailed the petition on January 13, 2002.

### ***CONCLUSIONS OF LAW***

A. A petition contesting a notice of determination of sales tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 1138[a][1]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued (Tax Law § 170[3-a][e]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see*, ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see*, ***Matter of Katz***, *supra*; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, *supra*).

The affidavits of two Division employees, Carl DeCesare and Daniel LaFar, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders like the one mailed to petitioner by certified mail. The affidavits generally describe the

various stages of producing and mailing conciliation orders and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the DeCesare and LaFar affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address appear on the first page of the certified mail record which bears a USPS date stamp of January 11, 2002. There are 21 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated that he received a total of 21 items for mailing. In short, the Division established that it mailed the Conciliation Order to petitioner by certified mail on January 11, 2002.

The envelope containing petitioner's petition bears a postmark of April 12, 2002. In accordance with 20 NYCRR 3000.22(b), the Division of Tax Appeals treated this date as the date of filing of the petition. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order. It should be noted, however, that petitioner is not without recourse here, because he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 1139[c]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law §§ 170[3-a][a]; 1139).

C. The petition of Mohamed T.M. Alshair is dismissed with prejudice.

DATED: Troy, New York  
August 15, 2002

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE